UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3393

GEORGE L. KARAPINKA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

THE HONORABLE CAROL LOS MANSMANN,
UNITED STATES DISTRICT COURT JUDGE,
Nominal Respondent
(E.D.Pa. Civil No. 81-915)

Present: WEIS, BECKER and DUSEN, Circuit Judges.

MEMORANDUM AND ORDER

Defendant moved the district court to transfer this case from the Western District of Pennsylvania to the Northern District of West Virginia. The district judge granted the motion, citing both 42 U.S.C. Sec. 2000e-5(f)(3) and 28 U.S.C. Sec. 1404(a). Adequete facts were stated in the district court's Memorandum to sustain a transfer under 28 U.S.C. Sec. 1404(a). We do not pass upon the merits of a transfer based upon 28 U.S.C. Sec. 1406(a) and 42 U.S.C. Sec. 2000-5(f)(3). We sug-

gest that the district court modify its order to read as follows:

> And, now, ___ day of _____, 1982, the motion to transfer filed by the defendant is hereby Granted and the above captioned case is transferred to the United States District Court for the Northern District of West Virginia, Clarksburg Division. See 28 U.S.C. Sec. 1404(a).

Accordingly, finding no basis for the issuance of a writ of mandamus, the petition for the grant of that writ is denied.

BY THE COURT,

x Weis
Circuit Judge
(first name and initials unlegible)

DATED: December 6, 1982

dt/cc: Mr. GLK
PJB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA, Plaintiff	)	
vs.	)	Civil Action
UNITED STATES GOVERNMENT, Defendant	)	No. 81-915

MEMORANDUM OPINION

This case comes before this Court on a Complaint filed pro se by Plaintiff in which he alleges, inter alia, that he was dismissed from his position as research chemist from the United States Department of Energy because of his national origin and as a reprisal for pointing out instances of mismanagement in the Department. Plaintiff further alleges that his First Amendment right of free speech and his right of privacy in his mail were also violated. He brings his action pursuant to Title VII of the Civil Rights Act.

Plaintiff's Complaint was received by the Clerk of Court on June 8, 1981, and was referred to the United States Magistrate for pretrial proceedings in accordance with the Ma-

gistrate's Act, 28 U.S.C. Sec. 636(b)(1) and Rules 3 and 4 of the Local Rules for Magistrates. Numerous pre-trial motions were filed and decided by the Magistrate, whose Report and Recommendations were subsequently adopted by U.S. District Judge Maurice B. Cohill. Those motions have been resolved and are not under consideration here.

At issue before this Court are two pending motions: a Motion for Summary Judgment filed by the Plaintiff and a Motion to Transfer filed by the Defendant. Both Motions were decided by the Magistrate and each was the subject of a separate Report and Recommendation. Since thir Court is of the opinion that venue does not properly lie within the Western District of Pennsylvania, and is, therefore, granting the Motion to Transfer, the Motion for Summary Judgment is not addressed.[1] Only the Motion to Transfer is at

[1] This Motion will be duly sent to the District Court to which this matter is transferred for consideration by that court.

issue here.

The factual background of this case shows that on August 8, 1980, Plaintiff was dismissed from his position as a research chemist for the United States Department of Energy in Morgantown, West Virginia. Plaintiff appealed this dismissal to the Merit System Protection Board (MSPB), which sustained the finding of the Philadelphia Field Office of the Board that Plaintiff had been removed from his position because of inefficient performance. Plaintiff then filed the instant action in the Western District of Pennsylvania and Defendant responded by filing a Motion to Dismiss for Lack of Venue which was, after a de novo review of the Magistrate's Report and Recommendation, denied by District Judge Cohill. Defendant then filed a Motion to Transfer, alleging in essence that venue was improper since there are no contacts in this judicial district whatsoever, since Plaintiff was employed, resided and presently resides in West Virginia; all of the employ-

ment records are in West Virginia; and all of the witnesses are in West Virginia.

On January 14, 1982, the Magistrate filed a Report which recommended that Defendant's Motion to Transfer be denied. The parties were given ten days from the day of service to file objections to the Report and Recommendation.[2]

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[2] If timely objections are filed, the district court is required to conduct a de novo review. However, if no objections are filed, it is within the discretion of the court to determine the standart of review. Since under the Federal Magistrate Act, 28 U.S.C.A. 636 (b)(1) the ultimate decision is to be made by the district judge and not the magistrate, the district judge is precluded only from accepting the magistrate's report and recommendation without any review whatsoever. Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). The court is aware of Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980) in which failure to file objections resulted in the forfeiture of the right of appeal from the district court's judgment, but since that is not at issue here, Park is not dispositive.

Although a resident of Morgantown, West Virginia, Plaintiff states that he filed his action here solely because, as the result of surgery, he stays part of the time with his sister in Pittsburgh, PA. It should be noted that Plaintiff had been permitted to amend his Complaint and he alleged therein that:

"1. All of the discriminatory practices committed against me in the United States Government were done in Morgantown (Northern West Virginia), with the exception of:

a) The harrassment to prevent the filing of my patent application. The violations were performed in Morgantown (Northern West Virginia), Oak Ridge (Tennessee) and Washington (District of Columbia).

b) The unlawfull (sic) discriminatory practices of the U.S. Merit Systems Protection Board in the process of my appeal were committed in Morgantown (Nrthern Vest Wirginia), (sic) Philadelphia (Pennsylvania), Washington (District of Columbia). I do not know where the falsification of the transcript of my appeal hearing was committed.

2. The employment records relavant (sic) to the unlawfull and discriminatory practices of the United States Government against me are probably maintained and administered in the judicial district of Northern West Virginia.

3. I probably would have worked in the ju-

dicial district of Northern West Virginia if I had not been removed from my position. There was a possibility of my transfer to Pittsbrgh (Pennsylvania), Washington (District of Columbia, or other Department of Energy locations."

Since Plaintiff is a federal employee, the applicable statute in determining the proper venue for an employment discrimination suit is 42 U.S.C. Sec. 2000e-16. Subsection (d) of that Act adopts 42 U.S.C. Sec. 2000e-5(f) which states:

> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relavant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

The Magistrate interpreted the above statute as positing venue <u>anywhere</u> in the state where an unlawful discriminatory act was com-

mitted and therefore recommended rhat the Motion to Transfer be denied because Plaintiff alleged that such unlawful "practices were committed, inter alia, in Philadelphia, PA" (namely, by the MSPB) and that venue was, therefore, proper in any judicial district in Pennsylvania.

In reading 42 U.S.C. 2000e-5(f), this Court reaches a contrary conclusion since it does not believe that the phrase "in which the unlawful employment practice is alleged to have been committed," etc., is a dependent clause which modifies "in the State". The untecedent of the dependent clause is not "in the State" but "any judicial district" which is also modified by "in the State". Assuming as true Plaintiff's allegations that unlawful discriminatory practices were committed by the MSPB against him in Philadelphia, PA, those acts were commited in the Eastern District of Philadelphia and not in the Western District where Plaintiff has filed his Complaint. Therefore, in order to re-

ly on that section of the statute, Plaintiff action should have been maintained in the Eastern District of Pennsylvania.

However, Defendant seeks transfer of this action to the Northern District of West Virginia pursuant to 28 U.S.C. 1404 (a). "Venue is primarily designed to protect defendants from inconvenient forums and courts from inconvenient lawsuits." Whittier v. Emmett, 281 F.2d 24, 30 (D.C. Cir. 1960). An examination of Plaintiff's responses to the Magistrate's request to amend his Complaint demonstrates that according to his allegations the majority of the discriminatory practices were committed in Northern West Virginia; harassment to prevent filing of his patent application occured in Northern West Virginia, inter alia; unlawful discriminatory practices by the United States Merit Systems Protection Board occurred in Northern West Virginia, inter alia; employment records relevant to the discriminatory

practices may be maintained in Northern West Virginia, inter alia; and Plaintiff, had he not been removed from his position, would probably have continued to work in Northern West Virginia.

Interpreting Plaintiff's statements in the light most favorable to him and bearing in mind the purpose of venue statutes, Defendant's Motion to Transfer to the Northern District of West Virginia is granted. It being the determination of this Court that venue is not proper in the Western District of Pennsylvania, Plaintiff's Motion for Summary Judgment is not properly before this Court and will be sent with the record for consideration before the Court in the Northern District of West Virginia. An appropriate Order follows.

x Carol Los Mansmann

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

vs.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

ORDER

And now, this 9th day of August, 1982, the Motion to Transfer by the Defendant is hereby GRANTED and the above-captioned case is transferred to the U.S. District Court for the Northern District of West Virginia.

The Report and Recommendation of the Magistrate dated January 14, 1982 is not adopted as the Opinion of this Court.

The Motion for Summary Judgment filed by the Plaintiff, and the Report and Recommendation of the Magistrate dated January 19,1982 with respect to the Motion are sent to the U.S. District court for the Northern District of West Virginia for consideration.

x Carol Los Mansmann
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

vs.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

O R D E R

In accordance with the MEMORANDUM AND ORDER dated December 6, 1982 of The United States Court of Appeals for the Third Circuit at No. 82-3393, the Order of this Court entered August 9, 1982 is hereby modified as follows:

And now, this 13th day of December 1982, the motion to transfer filed by the defendant is hereby Granted and the above captioned case is transferred to the United States District Court for the Northern District of West Virginia, Clarksburg Division. See 28 U.S.C. 1404(a).

x Carol Los Mansmann
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

v.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

MOTION TO TRANSFER CASE TO THE
NORTHERN DISTRICT OF WEST VIRGINIA

AND NOW comes the United States of America, by its Attorneys, J. Alan Johnson, United States Attorney for the Western District of Pennsylvania and Judith K. Giltenboth, Assistant United States Attorney for said District, and moves that this Honorable Court transfer this case to the Northern District of West Virginia for the reason that the Western District of Pennsylvania is an inconvenient forum as follows:

1. Plaintiff alleges an 80% residence in Morgantown, West Virginia and a 20% "partial residence" in Pittsburgh, PA at his unidentified sister's undisclosed address in Pittsburgh, PA.

2. The allegetly discriminatory acts oc-

cured in Morgantown, West Virginia and by virtue of an administrative hearing and the alleged storage of administrative records in Philadelphia, PA.

3. All of the witnesses and primary documents involved in this action are in Morgantown, West Virginia.

4. The Western District of Pennsylvania is an inconvenient forum for the prosecution and defense of this suit.

WHEREFORE, the United States of America respectfully requests this Honorable Court to transfer the action to the federal court in the Northern District of West Virginia.

Respectfully submitted,

A. ALAN JOHNSON
United States Attorney

by: JUDITH K. GILTENBOTH
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

v.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

O R D E R

AND NOW, to wit, this ____day of _____, 1981, it is hereby ORDERED that the action captioned "George L. Karapinka v. United States Government at Civil Action No. 81-915 (Western District of Pennsylvania) is transferred to the Northern District of West Virginia for the reason that the Western District of Pennsylvania is an inconvenient forum.

UNITED STATES DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

vs

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

MOTION TO RESOLVE THE QUESTION OF VENUE

I, George L. Karapinka the plaintiff respectfully request the Honorable Court to schedule the argument to resolve the question of venue on the above named action, which was raised by the defendant.

The complaint was filed on June 8, 1981. The summons was served upon the defendant on June 29, 1981. On July 17, 1981 the defendant filed motion to dismiss for lack of venue. This motion for some unknown reason was never scheduled for argument.

The plaintiff respectfully requests the Honorable Court to schedule plaintiff's motion to resolve the question of venue as soon as possible.

Respectfully submitted,

x George L. Karapinka
Plaintiff, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA,
Plaintiff

vs.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

AFFIDAVIT OF GEORGE L.
KARAPINKA

State of Pennsylvania
County of Allegheny

George L. Karapinka, of full age, being duly sworn upon his oath, deposes and says:

1. I make this affidavit to support my right of venue in the Western District of Pennsylvania.

2. I undervent the open heart surgery to replace my aortic valve in Pittsburgh, Pennsylvania in August of 1979.

3. I resided at my sister's Orysia Karapinka appartment, 5830 Elwood, Pittsburgh, Pennsylvania, 15232.

4. Prolonged drives impare my performance for at least one day.

5. Unlawfull employment practices were

committed by the United States Merit Systems Protection Board in Philadelphia, Pennsylvania.

x George L. Karapinka
George L. Karapinka

Sworn and subscribed
before me this 2nd day
of November, 1981.

x Mildred Eckert

Notary Public
4600 Fifth Ave.
Pgh; Pa. 15213

MILDRED ECKERT, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES AUG. 31, 1982
Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE L. KARAPINKA
Plaintiff

vs.

UNITED STATES GOVERNMENT,
Defendant

Civil Action
No. 81-915

ANSWER IN OPPOSITION TO THE MOTION TO TRANSFER THE CASE TO THE NORTHERN DISTRICT OF WEST VIRGINIA

The plaintiff respectfully requests the Honorable Court to dismiss the defendant's motion to transfer this case for the following reasons:

1. The unsworn alligations listed under "Facts" of the dwfendant's Brief in Support of Motion to Transfer are totally irrelevant to the subject matter of this motion. So are the unsworn Exhibits, which in addition of not being relevant, are prejudicious to the plaintiff.

2. The affidavit of Judith K. Giltenboth is meaningless. The affiant does not have first hand information. She avers to the unsworn information obtained from some agents. Contrary to the information in the affidavit

the records relevant to this action of Inspector General, U.S. Department of Energy are not located in West Virginia, they were and are located in Washington, D.C. The records of Special Counsel, U.S. Merit Systems Protection Board and the records of U.S. Merit Systems Protection Board were and are located in Washington, D.C. and Philadelphia, Pa. All of these agencies are part to this action (see the complaint).

The main fallacy of defendant's argument is the omission of the fact that there is no U.S. District Courthouse in Morgantown, W.V. Transportation of the records and witnesses from Morgantown, W.V. to the courthouse in the Northern District of West Virginia would be at least as difficult and expensive as their transportation to Pittsburgh, Pa. Transportation of witnesses from Morgantown, W.V to Pittsburgh, Pa. is more convenient than to the U.S. District courthouse of the Northern District of West Virginia in Elkins or most probably in Wheeling, W.V. Wheeling and

Pittsburgh are roughly equidistant from Morgantown. Moreover, it will be much more feasible for the following witnesses, all U.S. Government employees, to trevel to Pittsburgh, Pa.: Wm. J. Bayley resident of Washington, Pa.; D.A. Fontinella, B.D. Prasher, S.J. Sugiyama all residents of Washington, D.C. area; F.L. Fishman resident of Philadelphia, Pa. area; E.L. Larcher resident of Oak Ridge, Ten. area; than to trevel to the Northern District of West Virginia courthouse, most probably, in Wheeling, W.V. All of these witnesses will be subpenoed.

3. The most important reason why this action should remain in the Western District of Pennsylvania, is plaintiff's health reason. As described in the previous pleadings, inter alia, affidavit of George L. Karapinka to support his right of venue in the Western District of Pennsylvania, filed November 2, 1981 the plaintiff undervent the open heart surgery to replace his aortic valve, and drives from Morgantown, W.V. to Elkins or most pro-

bably to Wheeling, W.V. will impare his performance in the courtroom. During the proceedings on this action in Pittsburgh, Pa., the plaintiff will reside at his sister's apartement in Pittsburgh, Pa. The transfer of this action to the Northern District of West Virginia will be prejudicious to the plaintiff. Therefore, the justice will only be served in the Western District of Pennsylvania (Pittsburgh, Pa.) and not in the Northern District of West Virginia.

Respectfully submitted,

x George L. Karapinka
Plaintiff, pro se